Teknik Cekap Sdn Bhd v Villa Genting Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4(S5)–22–289 OF 1995

ABDUL MALIK ISHAK J

24 JUNE 2000

Contract *— Building contract — Deposit of retention sum into bank account until conclusion of trial — Action grounded on recovery of disputed debt — Whether exists obligation to set aside retention monies in separate identifiable account — Application of court's discretion under O 29 r 2(1) of Rules of the High Court 1980*

The defendant appointed the plaintiff as the main contractor in respect of the construction of the defendant's resort apartment. The defendant appointed an architect who had issued payment certificates certifying the sums payable to the plaintiff by the defendant. The plaintiff averred that the defendant had failed and/or refused to make payment of the sum specified in the certificates. By way of a summons-in-chambers, the plaintiff applied for an order that the defendant deposit the first moiety of the retention sum into a separate bank account until the conclusion of the trial. It was submitted that by virtue of cl 30(4) of the PAM conditions of contract, the defendant was in fact holding the retention monies as a trustee and in a fiduciary capacity. The defendant contested the plaintiff's application on the grounds, inter alia: (i) the plaintiff procured the contract by fraud and thus the contract became void and unenforceable; and (ii) the plaintiff did not plead breach of trust in the statement of claim and thus not entitled to the remedies sought by them.

Held, dismissing the application:

(1) The failure of the plaintiff to contradict an allegation amounted to an admission of the fact so asserted. The failure to rebut the defendant's averments of fraud meant that the plaintiff had admitted to the fact of procuring the contract by fraud (see p 528A).

(2) The conditions set out in the PAM contract were not applicable and the provisions of cl 30(4) of the PAM contract did not bind the parties at all. Also there was no obligation to set aside any retention monies in a separate identifiable account (see p 529E).

(3) The plaintiff must plead all the relevant facts to show a dishonest breach of trust. The plaintiff must also clearly and unequivocally plead knowledge on the part of the defendant of the dishonesty of that breach of trust. But the plaintiff had defaulted. There was a blatant failure to plead either the breach of trust or the particulars of the breach and so the plaintiff was not entitled to the remedies sought by them (see pp 530I–51A).

(4) The plaintiff's cause of action was grounded on a recovery of a debt which the defendant disputed. As a debt, the first moiety was not capable of being placed in a separate identifiable account. The court has a discretion under O 29 r 2(1) of the Rules of the High Court 1980 to refuse to accede to the application of the plaintiff (see p 531D, F).

[Bahasa Malaysia summary

Defendan telah melantik plaintif sebagai kontraktor utama berkenaan dengan pembinaan pangsapuri peranginan defendan. Defendan telah melantik seorang arkitek yang telah mengeluarkan sijil-sijil pembayaran yang mengesahkan jumlah-jumlah yang kena dibayar kepada plaintif oleh defendan. Plaintif menegaskan bahawa defendan telah gagal dan/atau enggan untuk membuat pembayaran jumlah tersebut yang dinyatakan di dalam sijil-sijil. Melalui suatu saman-dalam-kamar, plaintif telah memohon suuatu perintah bahawa defendan mendepositkan separuh bahagian pertama wang tahanan di dalam akaun bank yang berasingan sehingga kesimpulan perbicaraan tersebut. Dihujahkan bahawa menurut fasal 30(4) syarat-syarat kontrak PAM, defendan pada hakikatnya sedang memegang wang tahanan tersebut sebagai pemegang amanah dan di dalam kapisiti fidusiari. Defendan telah mencabar permohonan plaintif atas alasan, antara lain: (i) plaintif telah mendapatkan kontrak secara frod dan dengan itu kontrak tersebut adalah tak sah dan tidak boleh dikuatkuasakan; dan (ii) plaintif tidak memplid pelanggaran amanah di dalam pernyataan tuntutan dan dengan itu berhak kepada remedi-remedi yang dipohon oleh mereka.

Diputuskan, menolak permohonan tersebut:

(1) Kegagalan plaintif untuk menyangkal suatu pengataan terjumlah kepada suatu pengakuan fakta yang ditegaskan. Kegagalan plaintif untuk mematahkan penegasan frod defendan bermaksud bahawa plaintif telah mengaku kepada fakta mendapatkan kontrak secara frod (lihat ms 528A).

(2) Syarat-syarat yang dinyatakan di dalam kontrak PAM adalah tidak terpakai dan peruntukan fasal 30(4) kontrak PAM tidak mengikat pihak-pihak langsung. Juga tidak terdapat kewajipan untuk mengasingkan sebarang wang tahanan di dalam akaun berasingan yang boleh dikenal pasti (lihat ms 529E).

(3) Plaintif mestilah memplid semua fakta relevan untuk menunjukkan pecah amanah secara tidak jujur. Plaintif mestilah dengan jelas dan tidak taksa memplid pengetahuan di pihak defendan berkenaan dengan ketidakjujuran pelanggaran amanah tersebut. Terdapat juga kegagalan secara jelas untuk memplid sama ada pelanggaran amanah atau butir-butir pelanggaran tersebut dan maka plaintif tidak berhak kepada remedi-remedi yang dipohon mereka (lihat ms 530I–531A).

(4) Kausa tindakan plaintif adalah berdasarkan pengembalian semula hutang di mana defendan telah pertikaikan. Sebagai suatu hutang, separuh bahagian pertama tidak boleh diletakkan di dalam akaun berasingan yang boleh dikenalpasti. Mahkamah mempunyai budi bicara di bawah A 29 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk enggan bersetuju kepada permohonan plaintif (lihat ms 531D, F).]

[*Editorial Note*: The plaintiff has appealed to the Court of Appeal vide Civil Appeal No W–02–452 of 2000.]

Notes

For cases on building contract generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1696–1815.

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (refd)

A-G of Hong Kong v Aoki Construction Co Ltd (1981) 23 BLR 81; [1981] HKLR 635 (refd)

Aga Khan v Times Publishing Co, Dawson v Same [1924] 1 KB 675 (refd)

Astrovlanis Compania Naviera SA v Linard [1972] 2 QB 611; [1972] 2 All ER 647 (refd)

Cayne & Anor v Global Natural Resources plc [1984] 1 All ER 225 (refd)

Chaplin v Barnett (1912) 28 TLR 256 (refd)

Chief Constable of Kent v V & Anor [1982] 3 All ER 36 (refd)

Cobert Ltd v H Kumar (1992) 59 BLR 89 (refd)

Concorde Construction Co Ltd v Colgan Co Ltd (1984) 29 BLR 120 (refd)

Derry v Peek (1889) 14 App Cas 337 (refd)

Duke v Wisden (1897) 77 LT 67 (refd)

Elkington v London Association for Protection of Trade (1911) 27 TLR 329 (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)

HW Nevill (Sunblest) Ltd v William Press & Son Ltd (1981) 20 BLR 78 (refd)

JF Finnegan Ltd v Ford Sellar Morris Developments Ltd, JF Finnegan Ltd v Law 98 Ltd (1991) 53 BLR 38 (refd)

Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd (Syarikat Perumahan Pegawai Kerajaan Sdn Bhd, Garnishee) [1988] 1 MLJ 444 (refd)

MacJordan Construction Ltd v Brookmount Erostin Ltd (1991) 56 BLR 6 (refd)

Master v Miller (1791) 4 Term Rep 320 (refd)

Milbank v Milbank [1900] 1 Ch 376 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd) A
Nicholas v Gan Realty Sdn Bhd [1970] 2 MLJ 89 (refd)
P & M Kaye Ltd v Hosier & Dickinson Ltd [1972] 1 All ER 121; [1972] 1 WLR 146 (refd)
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (refd)
Pertab Chunder Ghose v Mohendra Purkait (1888–89) 16 IA 233 (refd) B
Philipps v Philipps [1878] 4 QBD 127 (refd)
Rayack Construction Ltd v Lampeter Meat Co Ltd (1979) 12 BLR 30 (refd)
Redland Bricks Ltd v Morris & Anor [1970] AC 653 (refd)
S v S, W v Official Solicitor [1970] 3 All ER 107 (refd) C
Saminathan v Pappa [1981] 1 MLJ 121 (refd)
Saunders v Jones (1877) 7 ChD 435 (refd)
Sharpe v San Paulo Rly Co (1873) LR 8 Ch App 597 (refd)
Spedding v Fitzpatrick (1888) 38 Ch D 410 (refd)
Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener) [1992] 2 MLJ 434 (refd) D
Thomson v Birkley (1882) 31 WR 230 (refd)
Thorp v Holdsworth [1876] 3 Ch D 637 (refd)
Waimiha Sawmilling Co v Waione Timber Co [1926] AC 101 (refd)
Wales Construction (London) Ltd v Franthom Property Ltd (1991) 53 BLR 23 (refd)
West Mercia Constabulary v Wagener [1981] 3 All ER 378 (refd) E
Westminster City Council v J Jarvis & Sons Ltd & Anor [1970] 1 All ER 943; [1970] 1 WLR 637 (refd)
Williams v Fitzmaurice (1858) 3 H & N 844 (refd)
Wooley v Broad [1892] 2 QB 317 (refd)
Yorkshire Provident Life Assurance Co v Gilbert & Rivington [1895] 2 QB 148 (refd) F
Young & Co v Scottish Union Co (1907) 24 TLR 73 (refd)

Legislation referred to

Contracts Act 1950 s 17 G
National Land Code 1965 s 340
Rules of the High Court 1980 O 18 r 12, O 29 r 2(1)

Ranjan Chandran (*Dhanaraj Sivasampu*) (*Hakem Arabi & Associates*) for the plaintif.

Annabel CH Chua (*Azman Davidson & Co*) for the defendant. H

Abdul Malik Ishak J:

Introduction

This was an application by the plaintiff by way of a summons in chambers as seen in encl 52 for an order that the defendant, its agents and its servants I to deposit the sum of RM1,706,001.50 being the first moiety of the retention sum into a separate bank account until the conclusion of this trial

A and action. In support of the application, the plaintiff affirmed two affidavits through Rahiman bin Bustaman as seen in encl 51 which was affirmed on 24 December 1999 and as seen in encl 60 that was affirmed on 7 April 1999. The defendant responded and filed two affidavits by way of a reply through M Angeline Raj: one affirmed on 27 March 2000 as seen in encl 62 and the other affirmed on 21 April 2000 as seen in encl 61. In short, the B defendant contested encl 52.

The plaintiff's application in encl 52 was more in the nature of an interim preservation of property as envisaged in O 29 r 2(1) of the Rules of the High Court 1980 ('the RHC') which states as follows:

C > On the application of any party to a cause or matter the court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

Basically, the attractive feature of this rule is to provide for the preservation D of property (*Chaplin v Barnett* (1912) 28 TLR 256; *Nicholas v Gan Realty Sdn Bhd* [1970] 2 MLJ 89; and *Tan Lay Soon v Kam Mah Theatre Sdn Bhd (Malayan United Finance Bhd, Intervener)* [1992] 2 MLJ 434) and the power of the court to act under this rule comes from its inherent jurisdiction with the ultimate motive of advancing and promoting a fair trial (*S v S, W v Official Solicitor* [1970] 3 All ER 107). Either the plaintiff or the defendant E is entitled to seek the assistance of this rule. If the sum of money is identifiable, then the process of preservation under this rule may be resorted to. Indeed this rule may be invoked to preserve an identifiable sum of money that arises from any criminal activity (*West Mercia Constabulary v Wagener* [1981] 3 All ER 378 and *Chief Constable of Kent v V & Anor* [1982] F 3 All ER 36). So long as the money can be preserved, this rule may be vigorously resorted to (*Polini v Gray* (1879) 12 Ch D 438).

Facts of the case

By a contract dated 12 April 1994, the defendant appointed the plaintiff as G the main contractor in respect of the construction of the defendant's resort apartment on Lot PT 11386, HS (D) 10563 Genting Highlands, Pahang Darul Makmur comprising of 688 units inclusive of two levels of commercial podiums, three levels of car parks and other external works ('the said works'). The defendant appointed Messrs Gerak Reka Akitek Sdn as the architect for the said works. The salient features of the contract may H compendiously be stated in these words:

(1) the architect would issue monthly certificates of payments stating the amount due to the plaintiff from the defendant and the plaintiff would be entitled to the payment stated therein within 21 days from the date wherein the respective certificates were presented to the I defendant;

(2) the amount stated as due under the monthly certificates of payments would be the value of the work done and 75% of the materials and

goods delivered by the plaintiff less 5% thereof which may be retained by the defendant as the retention fund; A

(3) upon practical completion of the said works, the architect would issue a certificate of practical completion together with a certificate for the release of one moiety of the retention fund and the plaintiff would then be entitled to the payment of the moiety within 21 days from the preservation of the certificate of practical completion to the defendant. B

It seemed that the plaintiff, in accordance with the terms of the contract, had completed the said works. It was averred that in the course of the said works, the defendant had retained the sum of RM3,412,003 as the retention fund. In due course, the architect had, on the following dates, issued payment certificates certifying that the following sums were payable to the plaintiff by the defendant: C

Certificate Numbers	Dates	Sums payable
18	9.2.95	RM2,568,800
19	30.3.95	RM1,464,000
20	28.4.95	RM1,052,700
21	1.6.95	RM1,666,600
		RM6,752,100

D E

Indeed the architect was empowered to certify that the said works have been practically or substantially completed (*Westminster City Council v J Jarvis & Sons Ltd & Anor* [1970] 1 All ER 943 at p 949, [1970] 1 WLR 637 at p 647; *HW Nevill (Sunblest) Ltd v William Press & Son Ltd* (1981) 20 BLR 78 at p 87 and these cases should be compared with that of *P & M Kaye Ltd v Hosier & Dickinson Ltd* [1972] 1 All ER 121, [1972] 1 WLR 146). Now, these payment certificates numbering 18, 19, 20 and 21 were presented by the plaintiff to the defendant and accordingly the sums stated therein became due and owing. It was averred that the defendant had paid the plaintiff the sum of RM2,500,000 under payment certificate No 18 but the defendant was obstinate and failed and/or refused to make payment of any other sums specified in payment certificate Nos 18, 19, 20 and 21 thereof. That being the case, the sum of RM4,252,100 remained due and owing under payment certificate Nos 18–21. F G H

On 5 May 1995, the architect issued the certificate of practical completion and the plaintiff presented that certificate to the defendant on or about the same day. In the premises, it was said that one moiety of the retention sum equivalent to RM1,706,001.50 became due and payable by the defendant. Unfortunately, the defendant refused to pay the sum of RM1,706,001.50 — which sum was due and payable under the certificate of practical completion. For these reasons, the plaintiff claimed as per the statement of claim in encl 1 against the defendant the following: I

(a) the sum of RM4,252,100 which was due and owing under payment certificate Nos 18–21;

(b) the sum of RM1,706,001.50 which was due and owing under the certificate of practical completion;

(c) interest on the above sums at the rate of 8% pa calculated from such date as the court deems fit;

(d) costs; and

(e) such further or other relief as the court thinks fit.

It is now clear as crystal that the plaintiff's application in encl 52 was orchestrated to ensure that the sum of RM1,706,001.50 was secured in the event the plaintiff was successful at the trial proper.

The defence and the counterclaim of the defendant raised interesting issues. It was said that the contract between the parties followed closely the standard PAM conditions of contract ('PAM contract') and the defendant emphasized that under cl 30(8) of the PAM contract, the interim certificate of payment and the certificate of practical completion shall not by themselves be conclusive evidence that any works, materials or goods to which it relates were in accordance with the contract specifications. The defendant also emphasized that all workmanships, materials and components throughout the said works shall comply with the Malaysian standards and/or Codes of Practice or as the case may be, the British standards and/or Codes of Practice or other standards or codes as are stipulated in the specifications. It was the defendant's stand that the plaintiff did not complete the said works in accordance with the contract. Under the PAM contract, it was the duty of the plaintiff to carry out and complete the said works (*P & M Kaye v Hosier & Dickinson Ltd*; and *Cobert Ltd v H Kumar* (1992) 59 BLR 89). The cases of *Williams v Fitzmaurice* (1858) 3 H & N 844 and *Sharpe v San Paulo Rly Co* (1873) LR 8 Ch App 597 would impose an obligation on the part of the plaintiff to do everything which was necessary to be done in order to complete the said works. It was said that the plaintiff had failed to comply with the specifications and had produced defective works. It seemed that the architect in issuing the certificates had failed to take into account the poor quality of the plaintiff's workmanship especially the defective works. It was said that the architect issued the interim certificates on the understanding that the plaintiff would subsequently rectify the defective works. On this premise, the defendant disputed the correctness of the certificates.

Even though the defendant admitted paying the plaintiff the sum of RM2,500,000, yet the defendant challenged the interim certificate No 21 by stating that the architect had failed to take into account the various omissions to the variation orders. Later, on or about 28 September 1995, the architect issued interim certificate No 22 wherein he authorized the deduction of RM1,310,000 for substantial major defective works, outstanding works and works that were not done in accordance with specifications. The defendant emphasized that due consideration and effect must be given to interim certificate No 22 and when so taken, it was said

that the defendant was entitled to set-off the authorized deduction against the plaintiff's claim. The defendant contended that the certificate of practical completion was null and void, and of no effect. It was also contended that the certificate of practical completion did not bind the defendant in that it was invalid and ought to be disregarded because:

(i) it was not issued independently;

(ii) it was issued with the collusion of the plaintiff;

(ii) it failed to take into account matters which should have been considered, like for instance:

(a) that the plaintiff had not completed nor handed over a substantial portion of the works;

(b) that there was failure on the part of the plaintiff in not completing the mechanical and electrical works within the meaning of the contract; it was said that under the contract, completion shall be deemed to include testing and commissioning of all plants, equipment controls and distribution networks;

(c) that the plaintiff failed to hand over the two levels of commercial podiums to the defendant.

It was for these varied reasons that the defendant said that it was not obliged to release the first moiety of the retention sum of RM1,706,001.50 to the plaintiff.

In regard to the set-off, the defendant averred that various items of losses and damages should be subtracted and these items were said to incorporate the following features:

(a)	estimated cost of rectification	RM2,500,000
(b)	liquidated and ascertained damages	RM4,925,000
(c)	works that were supposed to be carried out by the plaintiff but instead it was completed and done by the defendant	RM1,149,519.95
(d)	purchasers' claims for late delivery	RM5,013,797.04
(e)	due to the plaintiff's delay, together with the use of sub-standard materials and the quantum not listed subsequent change in market conditions, the sales of the defendant's condominiums in Phase 2 has been adversely affected and consequently the defendant has suffered tremendous loss of profits for Phase 2 and it could not be quantified	Quantum not listed
(f)	variation orders that were overcharged	RM1,700,000
(g)	materials incorporated into works	RM 508,900

A The defendant also alleged by way of an alternative that the plaintiff procured the contract illegally or by way of a fraud. The particulars of fraud were itemized and set out in this fashion:

(i) The plaintiff had paid the defendant's general manager by the name of Ler Cheng Koy and the site manager by the name of Chen Woon
B Hin secret bribes to the tune of RM550,000 in order to procure the contract. This sum was paid through a person by the name of Lim Hwa Keng who happens to be the brother in law of Ler Cheng Koy and, at the material time, was said to be a student.

(ii) The plaintiff had by way of a letter dated 24 April 1993 allegedly
C appointed Lim Hwa Keng Consultant for a fee of RM550,000 in order to 'obtain tender document, assistance in pricing, negotiating and finalising of tender' and at the same time to 'provide administrative services following award of contract.' It was, however, a term of the said letter that Lim Hwa Keng Consultant would not be paid its remuneration in the event the plaintiff was not successful in its
D tender exercise.

(iii) By a letter dated 24 May 1993, the plaintiff's sub-contractor by the name of Natamas Sdn Bhd allegedly appointed Lim Hwa Keng Consultant for a fee of RM100,000 in accordance with the terms of the plaintiff's letter dated 24 April 1993.

E (iv) Ironically, Lim Hwa Keng, who was purportedly said to be the project consultant of the plaintiff and who was paid a substantial amount of money was not and had never been mentioned in any correspondence nor attended any meeting whatsoever.

It was further averred that both Ler Cheng Koy and Chen Woon Hin
F acquiesced in a number of things. They did not object to the false claims for the said works that were not completed, neither did they object to the substitution of materials and equipments which were of lower quality or value to that specified nor did they object to the serious defects in the plaintiff's works. They too did not bring to the attention of the architect, the serious defects in the plaintiff's
G works.

So the stand of the defendant was quite simple. By bribing Ler Cheng Koy and Chen Woon Hin, the plaintiff was able to conceal deficiencies in the said works because both these two personalities conveniently and purposely failed to inform the architect of the existence of those inherent deficiencies.
H For these reasons, the defendant averred that the contract was void and unenforceable and so it was submitted that the plaintiff was disabled from enforcing the certificates that were issued thereto. That being the case, the defendant held onto the notion that damages for fraud was due to them and the particulars of fraud were listed as:

I (i) additional contract sum paid as a result of fraud;

(ii) cost of repairing and replacing concealed defects and omissions; and

(iii) variations that were fraudulently made.

In so far as the counterclaim was concerned, the defendant sought for: A

(a) damages;

(b) interest;

(c) costs; and

(d) further and other relief. B

All the affidavits in relation to encl 52 carried the same facts as found in the pleadings and there was thus no necessity for me to repeat them here. Suffice for me to say that arguments were canvassed along the facts as seen in the affidavits and the pleadings thereto.

C

The first moiety and the relevant issues thereto

In so far as encl 52 was concerned, the plaintiff was only concerned with the first moiety. Clause 9.01 of the PAM contract reads as follows:

> The Retention Sum shall be at 5% throughout the Contractual period. Upon the issue of certificate of practical completion, 2.5% shall be released and D whereas the remaining sum shall only be released at the end of the Defects Liability Period.

and using this as a leverage the plaintiff submitted through Mr Ranjan Chandran and Mr Dhanaraj Sivasampu that although the certificate of practical completion was issued on 5 May 1995 yet, to date, the defendant E had not released the first moiety notwithstanding the direction by the architect. The plaintiff was quite frank and in encl 51 of para 13 thereto, the plaintiff averred through Rahiman bin Bustaman that the second moiety was claimed in another court vide Civil Suit No S6–22–706–1999. So, the plaintiff's interest in encl 52 was mainly confined to the first moiety. Now, the certificate of practical completion that was issued on 5 May 1995 was F exhibited and marked as exh 'G' of encl 51 and it carried the architect's certification to the following effect:

> I/we declare that one moiety of the retention moneys deducted under previous certificates in respect of the said works or sections thereof is to be released.

The architect's role as an independent professional middleman can never be G doubted. In *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 (SC), Edgar Joseph Jr FCJ writing for the Federal Court aptly remarked at p 69 of the report that:

> Cast in his role of a professional middleman, the architect should, prima facie, be in an ideal position to ensure that both employer and contractor punctually H carry out their respective obligations under the contract. This is not to say that if the employer is dissatisfied with the performance of his architect, he is without remedy. In such a situation, the employer may terminate the services of his architect and appoint a substitute architect or even sue his old architect (see *Sutcliffe v Thackrah & Ors* [1974] AC 727; [1974] 1 All ER 859; [1974] 2 WLR 295). I

But unfortunately, the architect in the present case was in the dark in regard to the deficiencies in the said works because both Ler Cheng Koy and Chen

A Woon Hin were said to have been bribed by the plaintiff. Indeed if that was so, and here I cannot come to any definite conclusion until after the trial of the action, then the sting of the architect's certificate of practical completion was at its lowest ebb. The plaintiff sought to rationalise the application in encl 52 and advanced three interesting reasons:

B (i) to purely preserve the status quo of the case until the disposal of the substantive action and the final conclusion of the trial proper;

(ii) the profound fear of the plaintiff that the defendant may not have the necessary funds at a future date and may not be able to comply with any order of this court particularly in regard to the return of the first moiety, and it was to overcome this fear that the plaintiff had applied C for the first moiety to be deposited in a separate bank account.

(iii) it was said that the defendant held the first moiety as a fiduciary trustee for the benefit of the plaintiff and that being the case it was only right, so the submission went, that the first moiety should be deposited into a separate bank account to enable it to earn interest.

D The plaintiff was even magnanimous and was prepared to suggest two attractive options:

(a) that the first moiety be placed in a fixed deposit account in the joint name of both the plaintiff and the defendant solicitors' firms; or

E (b) that the first moiety be deposited into court until the conclusion of the trial.

Clause 30(4) of the PAM contract states that (the relevant portions only):

> (4) The amounts retained by virtue of sub-cl (3) of this Condition shall be subject to the following rules:
>
> F (a) The Employer's interest in any amounts so retained shall be fiduciary as trustee for the Contractor (but without obligation to invest) and the Contractor's beneficial interest therein shall be subject only to the right of the Employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this Contract to deduct from any sum due or G to become due to the Contractor.
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> (b) On the issue of the Certificate of Practical Completion the Architect shall issue a certificate for one moiety of the total amounts then so retained and the Contractor shall, on presenting any such certificate to the Employer, be entitled to payment of the said moiety within the Period for Honouring Certificates named in the appendix to these H Conditions.

and using this clause as a leverage the plaintiff submitted that the defendant was in fact holding the retention monies as a trustee and in a fiduciary capacity. It was further submitted that the retention monies held by the defendant be deposited in a separate bank account until the conclusion and I disposal of the trial. The plaintiff relied on a number of Commonwealth authorities in support of these submissions and I shall now refer to them, not in its order of priority. For a start, I shall refer to the judgment of Peh

Swee Chin J (as he then was) in the case of *Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd, (Syarikat Perumahan Pegawai Kerajaan Sdn Bhd, Garnishee)* [1988] 1 MLJ 444. At p 448 of the report, his Lordship had this to say:

> Again, the retention money concerned herein is declared by cl 30(4)(a) as being money held by the garnishee on trust for the judgment debtor. The implication would be inevitable that the retention money would belong beneficially to the judgment-debtor. In fact, in *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 34, a clause identical to cl 30(4)(a) herein came up for the court's interpretation in connection with a declaration being sought by a contractor from the court as regards his employer that the employer was obliged to pay the retention sum into a separate bank account to hold the same in trust for the contractor and consequential injunctions, Vinelott J allowed the declaration there. The object would appear to ensure that any potential judgment creditor of the employer would not execute in error his judgment on such retention sum.
>
> One cannot lose sight of the fact also that the retention sum was deducted for value of work already and actually done and materials already and actually supplied as certified by the architect to be due.
>
> In my judgment, the retention sum in this case is an existing debt and in fact an existing indebted sum that involves the payment, notionally and irresistibly pursuant to an interim certificate issued by the architect, by the garnishee to the judgment debtor and the latter's payment in turn back to the garnishee for retention for purposes already stated, with the garnishee holding the money as trustee for the judgment debtor. A debt in respect of such money began to exist in the circumstances and still does exist, and to contend otherwise would be to defy common sense and logic.

This would be followed by the case of *Concorde Construction Co Ltd v Colgan Co Ltd* (1984) 29 BLR 120, a decision of the High Court of Hong Kong. In that case, the court held that unless there were any special circumstances, the plaintiffs were entitled to insist that the employer set aside retention money in a separate trust fund for the benefit of the plaintiffs following closely the decision of *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 30. The court too held that the defendants were not entitled to have recourse to the trust fund simply because of their contention that they were entitled to such money by reason of the defects alleged; and flowing from this, the court held that although the defendants' case were arguable it was also purely speculative and it ought not to defeat the plaintiff's request. Following the dicta of Lord Upjohn in the case of *Redland Bricks Ltd v Morris & Anor* [1970] AC 653 at p 614, the court also held that an injunction to force an employer to set up a trust fund of retention moneys where cl 30(4)(a) of the Hong Kong conditions (in pari materia with cl 30(4)(a) of the PAM contract) apply and where there were no substantiated heads of deductions then the injunction should normally be granted 'as of course'. Finally, the court held that although the grant of interim injunction was discretionary the broad principle to be applied was that the court should do its best to avoid injustice and at the same time to balance the risk of doing an injustice to either party following closely the case of *Cayne & Anor v Global Natural Resources plc* [1984] 1 All ER 225. It is instructive to cite a passage of Rhind J who delivered the judgment of

Concorde Construction Co Ltd v Colgan Co Ltd that appears at p 135 of the report, and it is worded as follows:

> It is ridiculous to suggest that the main contractor can only insist on the trust being set up if it can adduce evidence of some shakiness in the employer's financial position. If the main contractor had to wait till such evidence was forthcoming it would often by then be too late to take steps which would result in the fund being secured. Rather than requiring the main contractor to show that the horse is showing signs of bolting, the courts allow it to take steps to have the stable door shut while there is still no suggestion of anything being amiss. In asking for a trust fund to be set up, the main contractor is merely acting prudently.

Next, it would be the case of *JF Finnegan Ltd v Ford Sellar Morris Developments Ltd, JF Finnegan Ltd v Law 98 Ltd* (1991) 53 BLR 38, a decision of Judge Esyr Lewis QC. In that case the plaintiff had filed an application asking the court to order that the retention monies be paid into a separate account and had applied for an interlocutory injunction to legally compel the defendant to do so. The court allowed the application and granted the injunction sought since to withhold the injunction, in the circumstances of the case, carried a greater risk of injustice than the granting of it. At p 49 of the report, Judge Esyr Lewis QC remarked:

> I consider, therefore, that once the employer indicates that he is exercising his right to retain a percentage of the sum due to the contractor when making an interim payment, the contractor is entitled at any time to request the employer to place the retention in a separate banking account and he is not obliged to make repetitive requests that this should be done each time an interim payment is made.

This would be followed by the case of *MacJordan Construction Ltd v Brookmount Erostin Ltd* (1991) 56 BLR 6, a decision of the Court of Appeal that was delivered by Scott LJ. At p 11 of the report, Scott LJ referred to the decision of Beldam LJ in *Wales Construction (London) Ltd v Franthom Property Ltd* (1991) 53 BLR 23, in particular to p 36 of the report where Beldam LJ had this to say:

> ... the only way in which the interest of the beneficiaries (the contractor and sub-contractors) in the retention fund could be safeguarded and preserved is if that fund is placed in a separate account ...

Next, it would be the case of *Wales Construction (London) Ltd v Franthom Property Ltd* (1991) 53 BLR 23, a decision of the Court of Appeal comprising of Beldam and Nolam LJJ. In that case, the plaintiff had issued a writ and claimed an injunction requiring the defendant to place the retention fund into a separate account and the court held that the employer's duty was to safeguard the interests of the beneficiaries and it would have been a breach of trust to simply appropriate the money and use it as a working capital. The court also stressed and laid emphasis to the fact that the right to trace depended upon the ability to identify the fund into which the money had been placed. At pp 36–37 of the report, Beldam LJ succinctly said:

The provisions in the contract between the parties in this case seem to me to be indistinguishable in their effect from the provision in the case of *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 34. That was a decision at first instance of Vinelott J in which he had to construe a clause the effect of which was, as I have said, in my view indistinguishable. The plaintiff contractors in that action were claiming a declaration that they were entitled to be paid forthwith. There was a mandatory injunction ordering the employers to pay the retention fund into a separate bank account and to apply the retention monies in accordance with the trust which was specified in a condition of the contract between the parties in that case. In particular, I would refer to the reasons given by Vinelott J, with which I agree, at p 38 for the provisions for retention in the contract. He said:

> 'If sub-cls (3) and (4) of condition 30 are read together, it is in my judgment clear that the purpose of the provisions for retention under the terms of condition 30(4)(a) is to protect both employer and contractor against the risk of insolvency of the other. The employer is protected by his right to retain a proportion of the sum certified as due in respect of work done against the risk that claims in respect of any failure to carry out the architect's instructions or in respect of delay or other breaches of the contractor's obligations will, in the event of the contractor's insolvency, rank as unsecured debts. The contractor is protected by the provisions of condition 30(4)(a) against the risk that his claim for payment of monies retained by the employer will similarly rank as an unsecured debt, save only for the lien conferred by the proviso to condition 26(2). Thus, both are protected if and to the extent that the employer carries out his obligation to set aside as a separate trust fund a sum equal to the retention monies. The contractor must be exposed to some degree of risk jeopardy if that is not done. It would in my judgment be wrong that he should continue to be exposed to this risk until the trial of the action.'

The reasoning in *Rayack Construction Ltd v Lampeter Meat Co* was followed by Nourse J (as he then was) in the case of *Re Jartay Developments* (1983) 22 BLR 134, and again in *Re Arthur Saunders Ltd* (1981) 17 BLR 125. It was also followed in a case in the High Court of Hong Kong in *Concorde Construction Co Ltd v Colgan* (1984) 29 BLR 120. The cases were mentioned without disapproval by this court in the case of *Henry Boot Building v Croydon Hotel & Leisure Co Ltd* (1985) 36 BLR 41. In my judgment cl 30.5.1 creates a clear trust in favour of the contractor and sub-contractors of the retention fund of which the employer is the trustee. The employer would be in breach of his trust if he hazarded the fund by using it in his business and it is his first duty to safeguard the fund in the interests of the beneficiaries. I would hold the contractors entitled to the protection which they seek and I would dismiss the appeal.

To summarize, there appears to be a discernible trend in the long line of cases beginning with the case of *Rayack Construction Ltd v Lampeter Meat Co Ltd* where the courts have by an order in the nature of mandatory injunctions required the employers to place the retention monies in separate bank accounts so as to protect the interests of the contractors.

Two more authorities relied upon by the plaintiff must be mentioned. The first would be the case of *Re Jartay Developments Ltd* (1982) 22 BLR 137 where the plaintiff had sought a declaration that the defendant should pay the retention monies as and when those monies were

A certified in a separate bank account and the court allowed the application. The second would be the case of *Re Tout And Finch Ltd* [1954] 1 All ER 127 where the court construed cl 11(h) of the Royal Institute of British Architects conditions of contract as a trust which would operate by way of an equitable assignment of assets described as the contractor's interest in the retention money. Now, all the authorities alluded to above, B so the submissions went, when applied to the parties in the present case would mean that the defendant was in actual fact holding those retention monies as a trustee and did so in a fiduciary capacity. As such, those retention monies, according to the authorities and according to the submissions, have to be deposited into a separate account for the following C reasons:

(1) for the setting up of a trust fund;

(2) for the preservation of those retention monies until the final conclusion of the trial;

(3) to ensure that those retention monies are not to be misappropriated; D

(4) to safeguard the contractor and to prevent him from being exposed to the risk of jeopardy if the necessary precaution was not undertaken; and

(5) to be able and capable of tracing those retention monies and identify the same.

E That was not the end of the matter. The defendant held opposite views.

Ms Annabel CH Chua, learned counsel for the defendant, in a classic show of bravado submitted that the contract between the parties, if it was not void or unenforceable, would readily give rise to a trust. However, she rightly emphasized that there were no trust monies to be placed in a separate F identifiable account for the following reasons:

(a) since the plaintiff procured the contract by fraud, the contract became void and unenforceable;

(b) since the plaintiff did not plead a breach of trust in the statement of claim, the plaintiff was not entitled to the remedies sought by them; G and

(c) alternatively, in the event the contract was not void nor unenforceable for fraud, then by virtue of the certificate of practical completion the first moiety of the retention sum was not capable of being placed into a separate account.

H It must be recalled that the defendant had set out the particulars of fraud in the statement of defence and the counterclaim as alluded to earlier. The same particulars of fraud were also repeated in encl 62. But unfortunately the plaintiff saw it fit not to rebut the particulars of fraud in their encl 60 save as to say that the defendant cannot conveniently turn the affidavit I evidence into a mini trial and that the burden of proving fraud was said to be on the higher side namely, beyond reasonable doubt (*Saminathan v Pappa* [1981] 1 MLJ 121). Ms Annabel CH Chua rightly submitted on the

authority of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 that the failure of the plaintiff to contradict an allegation amounted to an admission of the fact so asserted. The failure to rebut the defendant's averments in paras 6, 7, and 8 of encl 61 meant that the plaintiff had admitted to the fact of procuring the contract by fraud. Gopal Sri Ram JCA in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, at p 220 aptly said:

> Whenever a court is required to judicially appreciate affidavit evidence, it is a necessary adjunct of that function to ascertain whether allegations made are inherently improbable or inherently incredible or patently inconsistent with contemporaneous documents. Whether such an analysis ought to be undertaken depends upon the jurisdiction the court is exercising and, more importantly, upon the particular facts of a case.
>
> It is part of the function of a judge hearing an application for an injunction to decide whether a serious question requiring trial is disclosed. He therefore does not exceed his proper role in such an interlocutory proceeding by commenting upon the credibility of the evidence or any issue as it lies before him at that stage.

In short, the unrebutted affidavit evidence of the defendant clearly showed that the plaintiff had admitted to the existence of the fraud. That being the case, the contract on the strength of the affidavit evidence was void and unenforceable for fraud. This was the submission of Ms Annabel CH Chua for the defendant. It would be ideal that fraud be proved in open court in the course of the trial. Section 17 of the Contracts Act 1950 sets out five situations wherein 'fraud' may arise and it is worded thus:

> 'Fraud' includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
>
> (a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;
>
> (b) the active concealment of a fact by one having knowledge of belief of the fact;
>
> (c) a promise made without any intention of performing it;
>
> (d) any other act fitted to deceive; and
>
> (e) any such act or omission as the law specially declares to be fraudulent.
>
> *Explanation* — Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.
>
> *ILLUSTRATIONS*
>
> (a) *A* sells, by auction, to *B*, a horse which *A* knows to be unsound. *A* says nothing to B about the horse's unsoundness. This is not fraud in *A*.
>
> (b) *B* is *A*'s daughter and has just come of age. Here, the relation between the parties would make it *A*'s duty to tell *B* if the horse is unsound.
>
> (c) *B* says to *A*, 'If you do not deny it, I shall assume that the horse is sound.' *A* says nothing. Here, *A*'s silence is equivalent to speech.

A (d) *A* and *B*, being traders, enter upon a contract. A has private information of a change in prices which would affect *B*'s willingness to proceed with the contract. *A* is not bound to inform *B*.

In the context of a land transaction, Lord Buckmaster in the Privy Council's case of *Waimiha Sawmilling Co v Waione Timber Co* [1926] AC 101, aptly
B said at pp 106–107 the following:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.

C Professor Visu Sinnadurai in his book entitled *Law of Contract in Malaysia and Singapore: Cases and Commentary* (Butterworths, 2nd Ed, 1987) at Chapter 5 explained that the definition of fraud under s 17 of the Contracts Act 1950 are wider than the accepted definition of fraud under s 340 of the National Land Code 1965. Sir Richard Couch in *Pertab Chunder Ghose v Mohendra Purkait* (1888–89) 16 IA 233 while delivering the judgment of the
D Privy Council said at p 237 of the report: 'Where one party induces the other to contract on the faith of representations made to him, anyone of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently ...' It is also interesting to refer to the case of *AG of Hong Kong v Aoki Construction Co Ltd* (1981) 23 BLR 81,
E [1981] HKLR 635 which echoed the same sentiment. Be that as it may, the upshot of it all were these: the conditions set out in the PAM contract were not applicable and the provisions of cl 30(4) of the PAM contract did not bind the parties at all and there was no obligation to set aside any retention monies in a separate identifiable account. This was my judgment and I so hold accordingly.

F The defendant continuously and obstinately held the view that the plaintiff procured the contract by fraud. It was an intractable stand. The House of Lords in *Derry v Peek* [1889] 14 App Cas 337 laid down the principle that for fraud to be established, it was necessary to prove the absence of an honest belief in the truth of that which has been stated. At
G p 374 of the report, Lord Herschell aptly remarked that 'fraud is proved when it is shown that a false representation has been made: (1) knowingly; or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false.' The court in *Master v Miller* (1791) 4 Term Rep 320 at p 329 laid down a sound principle of law to the effect that 'no man shall be permitted to take the chance of committing fraud, without running any risk of losing
H by the event, when it is detected.' These general principles of law would certainly apply to the factual matrix of the present case.

In regard to the breach of trust, it was clearly not pleaded by the plaintiff in the statement of claim and its particulars were also not set out thereto. Order 18 r 12 of the RHC categorically states as follows:

I (1) Subject to para (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words —

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

and it requires that litigation between the parties should be conducted fairly, openly and without undue surprises and, consequently, to reduce costs (see the speech of Edmund Davies LJ in *Astrovlanis Compania Naviera SA v Linard* [1972] 2 QB 611, [1972] 2 All ER 647). Other judges followed suit. It was not a new idea. Edmund Davies LJ merely adopted the same basic idea and improved on it. Other brilliant judges before Edmund Davies LJ had this to say in regard to the function of particulars:

(a) to inform the opposite side of the nature of the case that they have to meet (per Lindley LJ in *Duke v Wisden* (1897) 77 LT 67 at p 68; per Buckley LJ in *Young & Co v Scottish Union Co* (1907) 24 TLR 73 at p 74, and *Aga Khan v Times Publishing Co, Dawson v Same* [1924] 1 KB 675 at p 679).

(b) to prevent the other side from being taken by surprise at the trial (per Cotton LJ in *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at p 413; and *Thomson v Birkley* (1882) 31 WR 230);

(c) to alert the opposite party of the kind of evidence they ought to be prepared with and with that knowledge to adequately prepare for trial (per Jessel MR in *Thorp v Holdsworth* [1876] 3 Ch D 637; *Elkington v London Association for Protection of Trade* (1911) 27 TLR 329 at p 330);

(d) to circumscribe and limit the generality of the pleadings as a whole (per Thesiger LJ in *Saunders v Jones* (1877) 7 Ch D 435);

(e) to circumscribe the claim and the kind of evidence that has to be led (*Milbank v Milbank* [1900] 1 Ch 376 at p 385);

(f) to strictly limit and define the issues to be tried and the kind of discovery that should be made (per Vaughan Williams LJ in *Milbank v Milbank*; and *Yorkshire Provident Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 148); and

(g) to restrict and tie the hands of both parties so that they cannot go astray unless with leave of the court (per Brett LJ in *Philipps v Philipps* [1878] 4 QBD 127 at p 133 and *Wooley v Broad* [1892] 2 QB 317).

I may add that in every pleading, a certain amount of detail is indeed necessary so as to ensure clearness and to prevent surprise at the trial. Precision is the name of the game. Words must be employed to convey the exact meaning. There should not be any confusion at all. An opponent must know what he is up to. What particulars need to be stated must surely be dependent on the facts of each case. In the context of the present case, the plaintiff must plead all the relevant facts to show a dishonest breach of trust. The plaintiff too must clearly and unequivocally plead knowledge on the

part of the defendant of the dishonesty of that breach of trust. But alas, the plaintiff had defaulted. There was a blatant failure to plead either the breach of trust or the particulars of the breach and so the plaintiff was not entitled to the remedies sought by them.

It must be emphasized that the defendant only discovered that the plaintiff had procured the contract by fraud after it found the letters exhibited as 'AR1' and 'AR2' to encl 62. This happened after the purported 'practical completion' of the contract. It cannot be said that the defendant was dragging its feet. The plaintiff made no effort at all to rebut the facts as stated in encl 62 and yet the plaintiff had the audacity to complain that the defendant was raising the issue of fraud. The law weighed heavily on the side of the defendant. Since the plaintiff did not rebut the facts as alluded to by the defendant, the plaintiff must be deemed to have admitted those facts (*Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287; and *Ng Hee Thoong & Anor v Public Bank Bhd*). The plaintiff had not controverted nor rebutted the issue of fraud. A fact is not rebutted by simply saying that it is irrelevant or raised in the improper forum. A fact is also not rebutted by merely alleging that the defendant is trying to resile from its allegations.

Basically, the plaintiff's cause of action was grounded on a recovery of a debt which the defendant vehemently disputed. The first moiety was said to be a debt. As a debt, it had no priority or privilege over other debts that were due to the plaintiff such as those debts that were certified as due by the architect in the interim certificates bearing Nos 18–22. Indeed, if the plaintiff was interested in preserving the status quo, why was the plaintiff only asking for the first moiety to be placed in a separate account, and not all of the certified sums certified by the architect in the interim certificates bearing Nos 18 to 22? To accede to the plaintiff's application in encl 52 would open the floodgates for building contractors to hastily come to the courts seeking orders for the debts to be preserved pending the trial of the actions. In my judgment, as a debt the first moiety was not capable of being placed in a separate identifiable account. Order 29 r 2(1) of the RHC gives a discretion to this court to refuse to accede to the application in encl 52. I accordingly exercised my discretion in favour of the defendant and dismissed encl 52, paras 1 and 2 with costs.

Application dismissed.

Reported by Jafisah Jaafar